North Dakota Attorney General's LAW REPORT

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SEARCH AND SEIZURE - INVESTIGATIVE STOP

In *State v. Bartelson*, 2005 ND 172, 704 N.W.2d 824, the court affirmed defendant's conviction of possession of marijuana with intent to deliver.

Around 3:30 p.m., the defendant was stopped on a highway south of Minot and cited for a tinted window violation. An anonymous caller informed the Ward County Sheriff's Department that a vehicle that had been stopped south of Minot contained a large amount of marijuana. After investigation, an agent learned that an officer has recently stopped the defendant on the highway, knew from previous intelligence that the defendant transported large amounts of marijuana from Colorado in his vehicle, and also knew, from two separate sources, a large amount of marijuana had recently been stolen from the defendant's home.

The agent asked officers to help in the search for the defendant's vehicle. The agent was the first to locate the defendant's vehicle. The agent followed the defendant for a few miles until another officer caught up to him and, approximately 42 minutes after the defendant was first stopped by an officer, he was stopped again.

The defendant explained to the officer that he had just been pulled over for the same tinted window violation. The officer went back to his police car to issue a written warning for the violation and, as the officer was writing out the warning, the agent approached the defendant and asked if he could search the vehicle. The defendant consented and marijuana was found inside of the vehicle. A passenger in the vehicle was arrested for possession of a suspended driver's license.

Citing Whren v. United States, 517 U.S. 806 (1996), the court recognized that traffic violations, even if pretextual, provide the requisite probable cause to conduct an investigatory vehicle stop. A police officer's subjective intentions in making a stop are not important as long as the traffic violation has occurred.

In this case, after learning that an officer had recently stopped the defendant on the highway, the second stopping officer testified he probably would not have stopped the vehicle for the same violation, if at that time, the vehicle did not match the vehicle description given to him by the agent. However, under Whren, an officer's subjective intent is not relevant in determining probable cause.

The second stopping officer had probable cause to stop the defendant's vehicle because of the tinted window traffic violation. The officer had testified it was not uncommon for a vehicle to be pulled over for the same violation twice in one evening by two different officers.

Whren does not require the court to delve into an officer's intent. An officer's probable cause does not disintegrate simply because another police officer had previously stopped the vehicle for the same violation. It is not unreasonable for officers to request assistance locating a vehicle. It is not unreasonable for different law enforcement officers to stop a vehicle twice for the same tinted window infraction in a short period of time. The stopping officers had probable cause to believe the defendant was committing a tinted window violation.

The court found it unnecessary to determine whether the defendant's consent to search the vehicle was valid. The defendant's passenger was arrested for possessing a suspended driver's license. When a vehicle occupant is arrested, law enforcement officers can conduct a search of the vehicle's passenger compartment contemporaneous to the arrest. The officer had independent probable cause to arrest the passenger before the drug evidence was discovered. Contraband which was the subject of

the suppression motion was in the passenger compartment and found during a search incidental to a valid custodial arrest.

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Laib v. State*, 2005 ND 187, 705 N.W.2d 845, the court affirmed a judgment denying Laib's application for post-conviction relief. On appeal, Laib claimed he received ineffective assistance of counsel at his criminal trial.

A defendant claiming ineffective assistance of counsel bears the heavy burden of proving his counsel's representation fell below an objective standard of reasonableness, and that the defendant was prejudiced by his counsel's deficient performance. There is a strong presumption that the trial counsel's representation fell within the wide range of reasonable professional assistance and courts must conscientiously attempt to limit the distorting effect of hindsight.

To the meet the "prejudice" requirement, defendant carries the heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The defendant must prove not only that counsel's assistance was ineffective but also must specify how and where trial counsel was incompetent and the probable different result.

Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial.

If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed. Upon review of the evidence, the court concluded that Laib failed to meet his burden of establishing a reasonable probability that, but for his counsel's purported errors, the result of his criminal trial would have been different.

POST-CONVICTION RELIEF - TIME FOR RESPONSE

In *Johnson v. State*, 2005 ND 188, 705 N.W.2d 830, the court remanded a judgment summarily dismissing an application for post-conviction relief to allow Johnson to respond to the State's motion to dismiss.

A post-conviction relief proceeding is civil in nature, and all rules and statutes applicable in civil proceedings are available to the parties. The North Dakota Rules of Civil Procedure govern and the North Dakota Rules of Court apply to these proceedings.

The State made a motion to dismiss the post-conviction relief application, asking the court to go beyond the face of Johnson's application. In this case, the State responded to an application for post-conviction relief by including a motion for summary disposition filed on July 1, 2005. The trial court issued its order summarily denying Johnson's application for post-conviction relief on July 5, 2005.

Johnson claimed he should have been given ten days to respond to the State's motion for summary disposition under N.D.R.Ct. 3.2. Although the State, in its notice of motion, cited Rule 3.2 and notified Johnson that he had ten days to respond to the motion, the court concluded that, because the State's motion asked the court to go beyond the face of Johnson's application, the motion was analogous to a motion for summary judgment under N.D.R.Civ.P. 56 and thus Johnson should have been given 30 days to respond.

When the State's motion for summary disposition asks the court to rely solely on the pleadings, under N.D.R.Ct. 3.2, a 10-day response time should be provided the respondent before the trial court rules. If the State's motion requesting summary disposition asks the trial court to go beyond the pleadings, it is treated as a N.D.R.Civ.P. 12(b) motion but rather as a N.D.R.Civ.P. 56 motion for summary judgment.

To the extent that N.D.R.Ct. 3.2 conflicts with another rule adopted by the court, it does not apply.

In this case, the State's motion for summary disposition was accompanied by 21 exhibits, and clearly asked the trial court to go beyond the face of the pleadings. Johnson should have been given 30 days to respond to the State's motion for summary disposition.

SECURITIES LAW - RENEWAL OF PROMISSORY NOTE - DOCUMENT AUTHENTICATION - INFORMATION AS THE CHARGING DOCUMENT

In *State v. Noorlun*, 2005 ND 189, 705 N.W.2d 819, the court affirmed defendant's convictions of nine counts of violating North Dakota's security law.

Prior to her death in May 2002, a woman invested $250,000 with the defendant in three promissory notes that were renewed at various times. The renewals occurred in 1998 and 1999.

By information, the State charged the defendant with three counts of selling or offering to sell unregistered or nonexempt securities in Cass County in these years, three counts of acting as a securities salesman or agent for those transactions without registering in North Dakota, and three counts of violating a cease and desist order issued by the Securities Commissioner.

After a preliminary hearing in March 2004, the defendant moved to dismiss the prosecution claiming he did not offer to sell unregistered and nonexempt securities on the dates alleged but that he merely renewed preexisting promissory notes. In addition, he claimed prosecution on the original notes were barred by a five-year statute of limitations and the renewals of the original notes were not new transactions. The motions were denied.

The defendant asserted the trial court's instructions regarding "notes" was incomplete because it did not explain the difference between a "note" and a "renewal" of a previous note. He claimed that any prosecution of the three original promissory notes was barred by the five-year statute of limitations of N.D.C.C. § 10-04-18. He also claimed that the renewals of existing notes were not new transactions and any prosecution on those notes were also barred by the five-year statute of limitations.

Reviewing the North Dakota securities laws, the court noted that it had consistently construed promissory notes to be securities. Every renewal note is a new and independent obligation in relation to the original note. Although commercial concepts may provide a defense to criminal intent in some prosecutions, the North Dakota securities law does not distinguish between a new note and a renewal for purposes of a securities violation. Rather, the securities law is concerned with whether the defendant's conduct constituted a sale or offer to sell unregistered or nonexempt securities as defined in N.D.C.C. ch. 10-04. The trial court correctly instructed the jury.

The defendant also claimed that five typewritten letters sent to the victim should not have been admitted into evidence. He claimed there was no proof the letters were signed or mailed by him and there was no proof the letters were received by the victim.

The letters were properly admitted. An adequate foundation may be established by testimony that identifies the evidence and establishes the competency, materialality, and relevancy of evidence. Before documentary evidence is admissible, it must be authenticated under a process establishing the relevancy of the document by connecting it with a person, place, or thing. A document may be authenticated by circumstantial evidence including the events preceding, surrounding, and following the transmission of the writing. This circumstantial evidence may also include information in the contents of the writing which is known by the purported sender and the recipient.

The State presented evidence from an expert in handwriting comparison. The expert testified that he compared the signatures of the letters with known writing samples from the defendant and concluded the defendant signed the letters. In addition, a Fargo police detective testified the letters had been received from the victim at her residence in response to a request for information pertaining to her involvement with the defendant. The information in the letters also support the determination that defendant sent the letters to the victim in Fargo. The foundational evidence was

sufficient to establish the defendant signed and sent the letters to the victim and that she received them in Fargo.

The court also rejected defendant's claim that the State had no jurisdiction or authority to file a criminal information under N.D.R.Crim.P. 7(a) until after the preliminary examination on March 25, 2004. He states the information was not properly filed until after the preliminary examination which was held after the five year statute of limitations had run on six counts relating to two of the notes.

The State initially charged the defendant with nine felonies by information filed in the district court within the five year statute of limitations of N.D.C.C. § 10-04-18. This section requires that an information be filed or an indictment found within five years after the alleged violation.

Under N.D.C.C. § 29-01-13(4), an information is an accusation in writing charging a person with a crime or public offense signed and verified by some person and presented to and filed in the district court. On its face, the information in this case did not show the prosecution was barred by the statute of limitations. An arrest warrant was issued by the district court judge with jurisdiction to hear, try, and determine the action under N.D.C.C. § 29-04-05. The information contained the same essential facts as would be alleged in a complaint and was accompanied by an affidavit of probable cause subscribed and sworn before a notary public. Although the information was filed before a preliminary examination was held, the fact that the preliminary examination was neither held nor waived did not invalidate an information unless the defendant objected before entering a plea. The defendant entered a not guilty plea without objecting to the information. The information was not invalid under N.D.C.C. § 29-09-02(3) and the court rejected the defendant's claim that the information could not be filed under N.D.R.Crim.P. 7(a) until after a preliminary examination was held.

The information received and filed in the district court was sufficient to commence the action against the defendant under N.D.C.C. § 29-04-05 within the five year statute of limitations.

TERRORIZING - THREAT

In *State v. Laib*, 2005 ND 191, 705 N.W.2d 815, the court affirmed defendant's conviction of terrorizing.

The defendant was charge with terrorizing his wife. Trial testimony was disputed as to exactly what happened at the couple's home. The defendant stated he had seen his wife strike one of their children with a spoon and he argued with her over the alleged abuse. He also testified that he discovered $1,000 was missing from the family safe and she had stated she had purchased five hundred dollars worth of medicine. The argument continued until he led his wife by the arm toward the door and out of the house. He testified that she came back into the house and slept on the couch.

The defendant's wife stated that he wanted to have sex and, after she refused, he became angry and a fight ensued. She testified the defendant grabbed her around the neck with his arms and choked her, pushed her into a wall, and forced her outside of the house while she was dressed only in a nightshirt. After a couple of minutes, she reentered the house and slept in the family's living room floor because one of the children was sleeping on the couch. She stated the defendant was standing inside at the top of the stairs watching her when she reentered the house and he periodically watched her throughout the night.

On appeal, defendant claimed that the evidence was insufficient to support a conviction for terrorizing because there was no evidence he verbally threatened his wife which, he contended, was required by the threat element of the offense. The State argued the threat contemplated by N.D.C.C. § 12.1-17-04 did not need to be verbal, but required only that a threat be communicated by speech, writing, or act.

Rejecting the defendant's claim, the court held that a threat does not have to be made verbally to be a terroristic threat under N.D.C.C. § 12.1-17-04.

Although this section does not define "threat," words in statutes are to be given their ordinary meaning. Applying dictionary definitions, the court noted the definition does not limit the method of communication of a threat to speaking.

To hold that a threat must be verbal would lead to the irrational result that a perpetrator could clearly threaten and terrorize a victim but would be

immune from the crime of terrorizing merely by not saying a word. Actions can speak louder than words.

Based upon the evidence in this case, the jury, as a reasonable fact-finder, could easily conclude that the defendant was threatening to commit an act dangerous to human life by locking his wife outside during a cold winter night without sufficient clothing or shelter. The evidence was sufficient to find the defendant guilty of terrorizing.

APPEAL - FAILING TO FILE TRANSCRIPT

In *Klose v. State*, 2005 ND 192, 705 N.W.2d 809, the court affirmed a trial court judgment dismissing Klose's application for post-conviction relief.

Klose claimed that he obtained ineffective assistance of counsel. The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by the court.

The court noted that its review of the record was limited because Klose had failed to provide a transcript of the evidentiary hearing on his ineffective assistance of counsel claim. An appellant is required to file a trial transcript with the court on appeal. If the appellant fails to comply, he assumes the risk and consequences of such failure. A pro se litigant is not granted leniency solely because of his status as such. The court will decline to review an issue if the record on appeal does not allow a meaningful and intelligent review of the trial court's alleged error. Based on the record, Klose neither demonstrated that his attorney's representation was deficient nor that a different result was probable.

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Matthews v. State*, 2005 ND 202, 706 N.W.2d 74, the court affirmed a judgment dismissing Matthews' application for post-conviction relief.

Matthews claimed that he received ineffective assistance of counsel because his trial counsel failed to subpoena certain witnesses for his hearing to suppress evidence found in his home.

A defendant arguing that he received ineffective representation because his trial counsel failed to call additional witnesses must show how any additional witnesses would have aided the defense's claim. The court requires more than a mere representation of what the testimony would be. Rather, the court requires some form of proof, such as an affidavit by the proposed witness or testimony in a post-conviction relief proceeding.

In this case, Matthews' only proof of what the additional witnesses might testify to was testimony from Matthews himself. He did not present affidavits from the additional witnesses nor did he have the witnesses testify at his post-conviction hearing. His testimony as to what the witnesses might say is not sufficient evidence as to what the witnesses would say.

Mere conclusory allegations that counsel failed to call certain witnesses without indicating what the testimony would have been, how it would have affected the outcome of the trial, or what prejudice may have resulted from the failure to call them do not support a claim of ineffective assistance of counsel.

Providing speculative evidence about what a witness might have said does not demonstrate that an attorney fell below a reasonable standard of conduct in not calling those witnesses.

CHANGE OF CUSTODY

In *State v. Shermer*, 2005 ND 210, ____ N.W.2d ____, the court affirmed defendant's conviction of possession of marijuana with intent to deliver, concluding that any defect in the change of custody goes to the weight of the evidence rather than its admissibility.

POST-CONVICTION RELIEF - SENTENCE - 85% RULE

In *State v. Raulston*, 2005 ND 212, ____ N.W.2d ____, the court affirmed the denial of Raulston's petition for post-conviction relief and also his motion under N.D.R.Crim.P. 35(a) to correct an illegal sentence.

After revocation of his probation for earlier offenses of interference with an emergency call and aggravated assault, the defendant was sentenced to five years imprisonment with three and one-half years suspended. A recommendation was made that Raulston be placed in the Tompkins Rehabilitation and Corrections Unit for alcohol treatment. Prior to his sentence, the district court explained the minimum and maximum penalties of the underlying convictions and informed the defendant of the possible consequences of an admission. The defendant then admitted to the probation condition violations without benefit of a plea agreement.

After his sentence, the defendant learned his aggravated assault conviction required him to served 85 percent of his 18 month sentence of imprisonment, rendering him ineligible for placement at Tompkins. He applied for post-conviction relief arguing that neither his guilty pleas nor his probation violation admissions were knowingly, intelligently, or involuntarily entered and that he was denied effective assistance of counsel. He also asked for correction of an illegal sentence under N.D.R.Crim.P. 35. The petition and motion were denied.

In affirming the trial court denials, the court noted that a sentence is illegal under N.D.R.Crim.P. 35(a) if it is not authorized by the judgment of conviction. Such a sentence may be contrary to statute, fail to comply with a promise of a plea bargain, or be inconsistent with the oral pronouncement of the sentence.

In this case, defendant claimed the district court expected that he would be placed in the Tompkins Center and that he might be released in eight or nine months if he completed the treatment process.

Because the aggravated assault conviction required the defendant to serve 85% of his sentence, placement in Tompkins and release in eight or nine months were impossibilities.

When a direct conflict exists between an unambiguous oral pronouncement of a sentence and a written judgment and commitment, federal precedent has held the oral pronouncement must control. However, if an ambiguity exists only between the two sentences, the record must be examined to determine the district court's intent. In this case, the district judge told defendant in open court that he would be recommended for placement Tompkins, and the recommendation was placed in the district court's written order. Defendant was also told he might be released in as few as eight or nine months but this statement was not part of the written order. The statements were, at best, analogous to an ambiguous oral sentence. The clear intent here was for the defendant to serve as much of his 18 month sentence as was required by law.

The defendant was not advised by the court or his counsel prior to entry of his pleas or admissions that his conviction of aggravated assault required him to serve 85% of the sentence pursuant to N.D.C.C. §12.1-32-09.1. The defendant argued that this omission is akin to the failure to inform a criminal defendant of a mandatory minimum sentence which is required under state and federal law for a guilty plea to be considered knowing, intelligent, and voluntary.

Rejecting this argument, the court noted that it had held the 85% service requirement imposed to be a parole condition not a mandatory minimum sentence. Although a district court may inform a defendant of the 85% rule requirement, and is encouraged to do so, there is no such requirement under the Rules of Criminal Procedure or North Dakota law.

QUALIFICATION OF EXPERT - CURATIVE INSTRUCTION - DESTRUCTION OF EVIDENCE

In *State v. Hernandez*, 2005 ND 214, ____ N.W.2d ____, the court affirmed the defendant's conviction of gross sexual imposition.

At trial, the State presented evidence that defendant picked up a twelve-year-old girl after school and took her to a Fargo motel where he

engaged in sexual acts with her. The girl reported the attack to her mother.

Her mother testified that she found a letter handwritten in Spanish in the screen door of her house about a day or two after the defendant was arrested. The letter was not addressed to a recipient and was not signed by its author. An English translation of the letter was introduced. It stated that "she went to the hotel with me and we had sex and that I didn't rape her" and "I don't deny that I got involved with her but she gave it to me voluntarily." The State also introduced expert testimony that identified defendant as the author of the handwritten letter.

The defendant claimed the trial court erred in permitting a licensed private investigator to testify as a handwriting expert without properly exercising the gate keeping functions required by Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). The defendant claimed the court must follow these decisions and also that the investigator lacked the qualifications, proficiency, and scientific methodology to analyze the writing in a Spanish letter.

In rejecting these claims, the court noted it had never explicitly adopted Daubert and Kumho Tire. The court is not required to follow Daubert and Kumho Tire, which involve admissibility of expert testimony in federal courts under the Federal Rules of Evidence. The court has a formal process for adopting procedural rules after appropriate study and recommendations by the Joint Procedure Committee, and the court would not adopt Daubert by judicial decision.

Under North Dakota law, the admission of expert testimony is governed by N.D.R.Evid. 702. This rule envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify. An expert need not be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. A trial court has broad discretion to determine whether a witness is qualified as an expert and whether the witness's testimony will assist the trier of fact. The court is reluctant to interfere with the broad discretion given to a trial court to decide the qualifications and usefulness of expert witnesses. A trial court will not abuse it discretion in admitting expert testimony whenever the expert's specialized knowledge will assist the trier of fact, even if the expert does not possess a particular expertise or special certification.

The court has implicitly recognized the admissibility of expert opinions about handwriting. In this case, the private investigator testified he had worked as an agent for the North Dakota Bureau of Criminal Investigation for almost 30 years and, in 1981, he received training for comparing questioned writing with known writing. He testified he had assisted in analyzing handwriting in 100 to 200 cases. Under the court's standard for allowance of expert testimony, the trial court did not abuse its discretion in determining the private investigator was qualified as an expert in handwriting analysis and deciding his testimony would assist the jury.

The entire letter written by the defendant was admitted to the jury the letter included statements about prior uncharged sexual misconduct by him. The defendant claimed that introduction of the entire letter violated the party's agreement to redact references to prior sexual contact between him and the complainant in all documents submitted to the jury. The English translation of the Spanish letter was not specifically identified as a document subject to the state's proposed redaction agreement and it was admitted into evidence without an objection by the defendant. In this case, the defendant's counsel specifically indicated that he did not object to the admission of the letter before the exhibits were submitted to the jury. Because the defendant did not object to the admission of the unredacted letter at trial, the standard of review requires a showing of obvious error under N.D.R.Crim.P. 52(b). Upon review of the letter and the facts of this case, the court concluded that any error in failing to insure redaction of the language cited by defendant did not affect his substantial rights nor was it obvious error.

At trial, the victim was cross-examined by defense counsel regarding the fact that she had not called her mother after the motel incident. Outside the presence of the jury, the trial court indicated that defense counsel had opened the door for the State to ask why the victim had not called her mother and for the victim to respond that she had not planned on telling her mother as this had been going on for several years.

Later in the trial, the jury heard testimony that the victim tested positive for gonorrhea and the incubation period for gonorrhea was five days. When the State asked the emergency room

pediatrician about the victim's history, the court allowed the testimony to rebut the implication that the victim had some other kind of sexual activity that caused the gonorrhea. The State thereafter elicited the doctor's testimony that the victim reported she had been sexually abused by the defendant on numerous occasions over the past seven years and most recently about a week before the motel incident. A second doctor testified to the same facts.

The court concluded that the doctors' testimony relating to the prior sexual assaults by the defendant was within the parameters of the door opened by the defendant. In response to testimony about the five day incubation period for gonorrhea, the trial court limited the State to a reasonable opportunity to rebut the implication that the victim had some other kind of sexual activity which caused the gonorrhea. The trial court provided the jury with a curative instruction specifically stating the limitation to be placed upon the doctor's testimony.

A jury is presumed to have followed instructions. A curative instruction to disregard certain evidence is generally sufficient to remove improper prejudice. In this case, the jury was specifically instructed about the limited use of the doctors' testimony. During closing argument, the state did not unduly focus on their testimony about the defendant's prior sexual misconduct against the victim. The doctor's limited testimony about the defendant's prior sexual activity with the victim was not reversible error.

The court also rejected defendant's claim that the state improperly destroyed a sample of potentially exculpatory evidence. During an emergency room examination at a hospital, a sexual assault kit was performed on the victim. In accordance with hospital policies, an additional swab from the victim was obtained, tested, and found to be non-motile sperm. After that test, the hospital technician destroyed the sample.

In rejecting defendant's claims, the court held the test result relating to the swab was admissible despite the defendant's claim that he could not test the sample and, without an DNA analysis, the result should have been excluded under N.D.R.Evid. 403. The court found the trial court properly balanced the probative value of the report and testimony about the results of the hospital's tests against the risk of unfair prejudice. The court also concluded the record did not establish the state violated the defendant's due process rights when the swab sample was destroyed by the hospital technician. The defendant failed to establish evidence to show bad faith by the State in the destruction of the test sample. Evidence destroyed in "bad faith" means evidence deliberately destroyed by, or at the direction of, a state agent who intended to thwart and to deprive the defense of information.

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Wright v. State*, 2005 ND 217, ____ N.W.2d ____, the court reversed the trial court's order granting Wright's application for post-conviction relief and order for a new trial.

Wright worked at Dakota Boys Ranch. A 13-year-old female resident told staff members that Wright had engaged in sexual intercourse with her in her room at 5 a.m. The victim was transported to a local hospital and her panties were given to the police. Subsequent testing found semen on the inside front of the victim's panties, and DNA testing established that Wright was the source of the semen. When interviewed by police, Wright denied having intercourse with the victim but signed a written statement that she had fondled his penis until he had ejaculated.

Wright was charged with gross sexual imposition and subsequently convicted.

Wright denied that he engaged in any sexual acts with the victim. He stated he was on the telephone in the office at Dakota Boys Ranch speaking with a female friend from North Carolina. He stated that during this conversation he and the woman discussed sex and he masturbated and ejaculated, wiped himself off with a blue towel which he placed into a basket of dirty laundry containing clothes from the victim. He also stated that he was being sarcastic when he admitted to police officers he had engaged in sexual activities with the victim.

Wright's trial counsel did not call the friend from North Carolina as a witness.

Wright filed an application for post-conviction relief, alleging his trial counsel had rendered ineffective assistance of counsel when he failed to

secure the woman's presence and testimony at the criminal trial. The trial court determined that Wright's counsel's failure to present the woman's testimony at the criminal trial fell below an objective standard of reasonableness and that Wright was prejudiced by counsel's conduct. A new trial was ordered.

Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by the court. A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Applying the Strickland v. Washington, 466 U.S. 668 (1984) standards, a defendant claiming ineffective assistance of counsel bears the heavy burden of proving, first, that counsel's representation fell below an objective standard of reasonableness, and, second, the defendant was prejudiced by counsel's deficient performance. To meet the "prejudice" requirement of Strickland, the defendant carries the heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The defendant must prove not only that counsel's assistance was ineffective but must also specify how and where trial counsel was incompetent and the probable different result.

If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed.

In reversing the trial court's order, the court concluded Wright failed to meet his burden of establishing a reasonable probability that, but for counsel's alleged errors, the result of his criminal trial would have been different.

The trial court appeared to have applied an erroneous legal standard in assessing the prejudice requirement of Strickland. The trial court concluded Wright had satisfied the prejudice requirement because the alibi witness was identified and her testimony would have aided the defense. The court misapplied the law. When alleging ineffective assistance of counsel, the defendant must demonstrate a reasonable probability of a different result. Obviously, if the defendant fails to identify the witness or specify how the testimony would have aided his case, he has failed to establish a reasonable probability of a different result. The converse, however, is not necessarily true. If the defendant identifies an uncalled witness and demonstrates the testimony would have aided his defense, that is merely the first part of the equation. The defendant must establish that, viewed within the context of the other evidence and overall conduct of the trial, there was a reasonable probability of a different result in the proceeding had the witness testified.

The State presented substantial evidence of Wright's guilt. The State's expert witness testified the location of the seminal fluid on the panties would be consistent with the sexual activity described by the victim.

Although Wright's proposed witness would have generally corroborated Wright's testimony that he had a telephone conversation with her, the woman's testimony would have contradicted Wright's version of the facts that they engaged in "phone sex." In addition, the woman's testimony would have directly contradicted Wright's alibi theory that he could not have had sex with the victim at or near 5 a.m. because he was on the phone with the woman from 4:45 a.m. to 6 a.m. The woman's phone records showed she called Wright at 4:45 a.m. However, it was 4:45 a.m. North Carolina time which would have been 3:45 a.m. Fargo time. The duration of the call was 88 minutes which would have lasted until 5:13 a.m. Fargo time. Rather than aid his defense to establish reasonable probability of a differing result, the woman's testimony directly contradicted Wright's theory of the timeline and his alibi that he could not have gone to the victim's room at any time between 4:45 a.m. and 6 a.m. In addition, this testimony would have been only relevant to one of the incidents charged against the defendant. He was charged with a second incident and convicted of that offense as well. Wright failed to establish a reasonable probability that, but for the alleged errors of counsel, the result of his criminal trial would have been different.

My staff and I wish each of you and your families a happy and safe New Year.

Wayne Stenehjem

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